

October 15, 2012

VIA ELECTRONIC MAIL

The Honorable Denise L. Cote
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1610
New York, NY 10007-1312

Per DLC Chambers, docket in:	
11-cv-5201	11-cv-6188
11-cv-6189	11-cv-6190
11-cv-6192	11-cv-6193
11-cv-6195	11-cv-6196
11-cv-6198	11-cv-6200
11-cv-6201	11-cv-6202
11-cv-6203	11-cv-6739
11-cv-7010	11-cv-7048

Re: FHFA Actions: Briefing Schedule Regarding Sampling Expert Reports

Dear Judge Cote:

We write on behalf of Plaintiff Federal Housing Finance Agency (“FHFA”) to request that the Court set a briefing schedule for any objections by Defendants (other than UBS)¹ to the Expert Report of Charles D. Cowan, Ph.D. Regarding the Selection of Statistically Valid Random Samples for Fifteen FHFA Actions (the “Second Cowan Report”), which FHFA served on the relevant Defendants on October 10, 2012.

As set forth in the Second Cowan Report, the proposed sampling methodology is common across all securitizations in these cases.² FHFA therefore respectfully requests that a schedule be set for all Defendants (other than UBS) to assert, in common or coordinated briefing, any challenges to the opinions disclosed in the Second Cowan Report, including under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

Defendants stated on August 24, 2012 that they would be willing to discuss scheduling “in the fall,”³ but six weeks later, Defendants continue to claim that it is “premature” to set a schedule.⁴ They cite UBS’s unauthorized October 11 sur-reply as a reason to delay briefing, *id.*,⁵ but UBS admits that it does not intend to object to Dr. Cowan’s report. Instead, it improperly attempts to reserve its rights. *See* Dfds.’ Resp. to Plf’s Reply Memo. in Support of the Cowan

¹ Dr. Cowan addressed the UBS Securitizations in his first report, as to which briefing has already been submitted by both Plaintiff and the UBS Defendants.

² Consistent with the samples proposed for the UBS case, 100-loan samples are drawn from the supporting loan groups in each securitization and stratified by the variable of borrower credit score (where available), thus ensuring representativeness at a 95 percent confidence level with a margin of error of no more than plus or minus 10 percent. Each sample has been tested for representativeness using up to eleven key variables, confirming a high correspondence between the characteristics of the samples and those of the loan populations.

³ Email from Jonathan Sedlak, on behalf of all Defendants except UBS, to counsel for FHFA dated August 24, 2012, attached as Exhibit 1.

⁴ Ltr. from Amanda Davidoff, on behalf of all Defendants except UBS, to Philippe Selendy dated October 13, 2012, attached as Exhibit 2 (responding to FHFA’s letter of October 10, 2012, attached as Exhibit 3).

⁵ While UBS’s submission was improper, FHFA will not respond to it unless the Court regards it as useful.

Report, 11-CV-5201 (DLC), Doc. No. 205 (Oct. 11, 2012), at 2 (UBS “will not file a *Daubert* challenge to the opinions in Dr. Cowan’s current report, but reserve[s] the right to challenge any later-expressed opinions.”) (attached as Exhibit 4).⁶

FHFA therefore proposes that, if Defendants intend to object to the Second Cowan Report, any objections be filed by October 30, 2012, with FHFA’s opposition due November 13, 2012, and any reply due November 20, 2012. Defendants oppose FHFA’s request that any such briefing occur at this time.

⁶ Defendants also requested, for the first time in their October 13, 2012 letter, a series of additional materials relating to “how Dr. Cowan has applied his general methodology (so far) to obtain the loan numbers for each sample.” But they do not assert that such information is necessary, rather only that they “may require” it, without explaining why. *Id.*

Very truly yours,

/s/ Philippe Z. Selendy
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Agency in FHFA v. UBS Americas, Inc., FHFA v.
JPMorgan Chase & Co., FHFA v. Deutsche
Bank AG, FHFA v. Citigroup Inc., and FHFA v.
Goldman, Sachs & Co.*

/s/ Christine H. Chung
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Agency in FHFA v. First Horizon National
Corp., FHFA v. Bank of America Corp., and
FHFA v. Credit Suisse Holdings (USA), Inc.*

/s/ Richard A. Schirtzer
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Adam Abensohn
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*Attorney for Plaintiff Federal Housing Finance
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Holdings, Inc.
and FHFA v. Nomura Holding America, Inc.*

/s/ Manisha M. Sheth
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*Attorney for Plaintiff Federal Housing Finance
Agency in FHFA v. JPMorgan Chase & Co.,
FHFA v. Barclays Bank PLC, FHFA v. Citigroup
Inc., and FHFA v. Merrill Lynch & Co., Inc.*

/s/ Michael A. Hanin
Michael A. Hanin
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*Attorney for Plaintiff Federal Housing Finance
Agency in FHFA v. Ally Financial Inc., FHFA v.
General Electric Company., FHFA v. Morgan
Stanley, and FHFA v. SG Americas, Inc.*

cc: All Counsel of Record

Exhibit 1

Jeremy Tourish

From: Sedlak, Jonathan M. [sedlakj@sullcrom.com]
Sent: Friday, August 24, 2012 11:12 AM
To: Christine Chung; Shane, Penny; alexander.drylewski; William.OBrien@skadden.com; MHanin; *JPFHFAAssociates; ABosse; afrankel@stblaw.com; alexander.drylewski; allie.cheatham; amichaelson@bsflp.com; amirchreff; anthony.gill; AShapiro; aturner; avan; awatzman; Awu; azolot; Bathaee, Yavar; bostrager; bkarp; Bradley, Megan; Braff, David H.; Brian E. Pastuszewski; Brian.weinstein; bridget.oconnor; Bruce Birenboim; Bryan.Levine@skadden.com; BStewart@wc.com; CGrusauskas; camaratac; Cassady, Elizabeth A.; Castleman, David A.; cbernard; christina.trapani@weil.com; Clark, Bruce E.; Coyle, Victoria A.; cprovenzano; Daniel.schwartz; David A. Beck; david.byeff@weil.com; david.priebe; Davidoff, Amanda Flug; Day, Brendan; Dblatt; Dehoney, David R.; Diffie, Christopher M.; djames; Don M Kennedy; DPotter; dstein; dtyukody; dwoll; dzinman@rkollp.com; EBennett; Edelman, Theodore; edlinr; erosen; Farbiarz, Adam J.; Frawley, Brian T.; Fritsch, Joshua J.; fugate; greg.danilow; Harris, Adrienne A.; High, Tracy Richelle; hong; Hu, Ellen C.; irethy; jane.morril; jarteaga; jay.kasner; JBurns@KRAMERLEVIN.com; lipps; battle; jgibbons; jhaims; jlongwell; John B Daukas; John J Falvey; jmcnichols@wc.com; john.mastando; jconnolly@rkollp.com; jrobinson; jsneider@bsflp.com; julia.kiechel; Katzman, David P.; kfernandez; khamm; kim.kalmanson; Klapper, Richard H.; Kleysteuber, Rudy; Krugman, Maya; leftonr; Leif Dautch; Li, Olivia S.; LMorton; Imoskowitz@cravath.com; Marley.Brumme; mbloom@cravath.com; McCarthy, John G.; McCullough, Austin F.; McLendon, Aliya M.; mreynolds; michael.firestone@weil.com; mmcgarra@stblaw.com; msilver; mware; nadia.moore; nbinder@rkollp.com; Nelles, Sharon L.; nicholas.george; nicolas.morgan; ntekeei@rkollp.com; Oster, John F.; pamela.chepiga; patrick.fitzmaurice; pbryan; petercho; Pierre, Jennifer; Popovsky, Mark A.; Razza, Jordan T.; Reilly, Katherine C.; Rein, David M.J.; rgoeke; rclary; RLeraris; RMBS-LIT@mayerbrown.com; Robert J. Kopecky; robert.fumerton; rouhandeh; roy.gilchrist@weil.com; rserio; rspehr; Sacca, Joseph N.; sandra.hauser; SBonderoff; scady; scott.musoff; Scott, Jeffrey T.; seth.goodchild@weil.com; shirli.weiss; Sinopole, Angelica M.; Sollors, David M.; Stanislaus, Darnell; sbuerge; trice; Tomaino Jr., Michael T.; vernon.broderick@weil.com; Wayne, Stephanie S.; Weir, William H.; White, Thomas C.; Yue, Yujing; Andrew Dunlap
Cc: 'mkasowitz@kasowitz.com'; 'kleung@kasowitz.com'; CBecker; cjohnson; Manisha Sheth; Nicholas Joseph
Subject: RE: Briefing on Sampling

Christine,

Thanks for your email about a possible schedule for motions directed at Plaintiff's potential sampling proposals in the tranche II through IV cases. We believe that the Court outlined a process for the tranche II through IV cases during the July 31 conference that calls for the parties to discuss a potential motion schedule only after the parties in the FHFA v. UBS action have exchanged whatever sampling protocols or briefing they believe to be appropriate. Tr. at 98:10-23 ("Again UBS gets the great honor and privilege of being the stalking-horse on the issue for everyone."). At some point "during the fall," once Plaintiff has provided the non-UBS defendants with Plaintiff's proposed sampling protocols for the tranche II through IV cases, the parties would discuss the schedule for the Daubert challenges contemplated by Judge Cote during the July 31 conference or other responses in those cases. Tr. at 98:17-20 ("Then, any other defendant who wishes to bring a similar Daubert motion based upon the plaintiff's sampling protocol in their case may during the fall talk with Mr. Selendy about a schedule.").

As the Court clearly articulated how the parties should proceed with regard to a schedule, we look forward to discussing a schedule with you in the fall. In the meantime, please let us know by when we may expect to receive Plaintiff's proposed sampling protocols in the tranche II through IV cases. We look forward to discussing the remaining schedule for exchanges on this issue thereafter.

Regards,

Jon

Jonathan Sedlak
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125 Broad Street
New York, NY 10004
212-558-1666
sedlaji@sullcrom.com

From: Christine Chung [mailto:christinechung@quinnemanuel.com]

Sent: Monday, August 20, 2012 7:40 PM

To: Shane, Penny; alexander.drylewski; Sedlak, Jonathan M.; William.O'Brien@skadden.com; MHanin; *JPFHFAAssociates; ABosse; afrankel@stblaw.com; alexander.drylewski; allie.cheatham; amichaelson@bsflp.com; amirchaff; anthony.gill; AShapiro; aturner; avan; awatzman; Awu; azolot; Bathaee, Yavar; bostrager; bkarp; Bradley, Megan; Braff, David H.; Brian E. Pastuszewski; Brian.weinstein; bridget.oconnor; Bruce Birenboim; Bryan.Levine@skadden.com; BStewart@wc.com; CGrusauskas; camaratac; Cassady, Elizabeth A.; Castleman, David A.; cbernard; christina.trapani@weil.com; Clark, Bruce E.; Coyle, Victoria A.; cprovenzano; Daniel.schwartz; David A. Beck; david.byeff@weil.com; david.priebe; Davidoff, Amanda Flug; Day, Brendan; Dblatt; Dehoney, David R.; Diffie, Christopher M.; djames; Don M Kennedy; DPotter; dstein; dtyukody; dwoil; dzinman@rkollp.com; EBennett; Edelman, Theodore; edlinr; erosen; Farbiarz, Adam J.; Frawley, Brian T.; Fritsch, Joshua J.; fugate; greg.danilow; Harris, Adrienne A.; High, Tracy Richelle; hong; Hu, Ellen C.; irethy; jane.morril; jarteaga; jay.kasner; JBurns@KRAMERLEVIN.com; lipps; battle; jgibbons; jhaims; jlongwell; John B Daukas; John J Falvey; jmcnichols@wc.com; john.mastando; jconnolly@rkollp.com; jrobinson; jsneider@bsflp.com; julia.kiechel; Katzman, David P.; kfernandez; khamm; kim.kalmanson; Klapper, Richard H.; Kleysteuber, Rudy; Krugman, Maya; leftonr; Leif Dautch; Li, Olivia S.; LMorton; Imoskowitz@cravath.com; Marley.Brumme; mbloom@cravath.com; McCarthy, John G.; McCullough, Austin F.; McLendon, Aliya M.; mreynolds; michael.firestone@weil.com; mmcgarra@stblaw.com; msilver; mware; nadia.moore; nbinder@rkollp.com; Nelles, Sharon L.; nicholas.george; nicolas.morgan; ntekeei@rkollp.com; Oster, John F.; pamela.chepiga; patrick.fitzmaurice; pbryan; petercho; Pierre, Jennifer; Popovsky, Mark A.; Razza, Jordan T.; Reilly, Katherine C.; Rein, David M.J.; rgoeke; rclary; RLeraris; RMBS-LIT@mayerbrown.com; Robert J. Kopecky; robert.fumerton; rouhandeh; roy.gilchrist@weil.com; rserio; rspehr; Sacca, Joseph N.; sandra.hauser; SBonderoff; scady; scott.musoff; Scott, Jeffrey T.; Sedlak, Jonathan M.; seth.goodchild@weil.com; shirli.weiss; Sinopole, Angelica M.; Sollors, David M.; Stanislaus, Darnell; sbuerge; trice; Tomaino Jr., Michael T.; vernon.broderick@weil.com; Wayne, Stephanie S.; Weir, William H.; White, Thomas C.; Yue, Yujing; andrewdunlap

Cc: 'mkasowitz@kasowitz.com'; 'kleung@kasowitz.com'; CBecker; cjohnson; manishasheth; nicholasjoseph

Subject: RE: Briefing on Sampling

I don't think I've received any response to this proposal – is it possible to move forward?

Best,

c.

From: Christine Chung

Sent: Wednesday, August 15, 2012 11:02 AM

To: 'Shane, Penny'; 'alexander.drylewski'; 'Sedlak, Jonathan M.'; 'O'Brien, William J'; 'Hanin, Michael'; '*JPFHFAAssociates'; 'ABosse'; 'afrankel@stblaw.com'; 'alexander.drylewski'; 'allie.cheatham'; 'amichaelson@bsflp.com'; 'amirchaff'; 'anthony.gill'; 'AShapiro'; 'aturner'; 'avan'; 'awatzman'; 'Awu'; 'azolot'; 'Bathaee, Yavar'; 'bostrager'; 'Brad S. Karp'; 'Bradley, Megan'; 'Braff, David H.'; 'Brian E. Pastuszewski'; 'Brian.weinstein'; 'bridget.oconnor'; 'Bruce Birenboim'; 'Bryan.Levine@skadden.com'; 'BStewart@wc.com'; 'Caitlin Grusauskas'; 'camaratac'; 'Cassady, Elizabeth A.'; 'Castleman, David A.'; 'cbernard'; 'christina.trapani@weil.com'; 'Clark, Bruce E.'; 'Coyle, Victoria A.'; 'cprovenzano'; 'Daniel.schwartz'; 'David A. Beck'; 'david.byeff@weil.com'; 'david.priebe'; 'Davidoff, Amanda Flug'; 'Day, Brendan'; 'Dblatt'; 'Dehoney, David R.'; 'Diffie, Christopher M.'; 'djames'; 'Don M Kennedy'; 'DPotter'; 'dstein'; 'dtyukody'; 'dwoil'; 'dzinman@rkollp.com'; 'EBennett'; 'Edelman, Theodore'; 'edlinr'; 'erosen'; 'Farbiarz, Adam J.'; 'Frawley, Brian T.'; 'Fritsch, Joshua J.'; 'fugate'; 'greg.danilow'; 'Harris, Adrienne A.'; 'High, Tracy Richelle'; 'hong'; 'Hu, Ellen C.'; 'irethy'; 'jane.morril'; 'jarteaga'; 'jay.kasner'; 'JBurns@KRAMERLEVIN.com'; 'Jeff Lipps'; 'Jen Battle'; 'jgibbons'; 'jhaims'; 'jlongwell'; 'John B Daukas'; 'John J Falvey'; 'John McNichols'; 'john.mastando'; 'Jon Connolly'; 'jrobinson'; 'jsneider@bsflp.com'; 'julia.kiechel'; 'Katzman, David P.'; 'kfernandez'; 'khamm'; 'kim.kalmanson'; 'Klapper, Richard H.'; 'Kleysteuber, Rudy'; 'Krugman, Maya'; 'leftonr'; 'Leif Dautch'; 'Li, Olivia S.'; 'LMorton'; 'Imoskowitz@cravath.com'; 'Marley.Brumme'; 'mbloom@cravath.com'; 'McCarthy,

John G.'; 'McCullough, Austin F.'; 'McLendon, Aliya M.'; 'Michael T. Reynolds'; 'michael.firestone@weil.com'; 'mmcgarry@stblaw.com'; 'msilver'; 'mware'; 'nadia.moore'; 'nbinder@rkollp.com'; 'Nelles, Sharon L.'; 'nicholas.george'; 'nicolas.morgan'; 'ntekeei@rkollp.com'; 'Oster, John F.'; 'pamela.chepiga'; 'patrick.fitzmaurice'; 'pbryan'; 'petercho'; 'Pierre, Jennifer'; 'Popovsky, Mark A.'; 'Razza, Jordan T.'; 'Reilly, Katherine C.'; 'Rein, David M.J.'; 'rgoeke'; 'Richard W. Clary'; 'RLeraris'; 'RMBS-LIT@mayerbrown.com'; 'Robert J. Kopecky'; 'robert.fumerton'; 'rouhandeh'; 'roy.gilchrist@weil.com'; 'rserio'; 'rspehr'; 'Sacca, Joseph N.'; 'sandra.hauser'; 'SBonderoff'; 'scady'; 'Scott D. Musoff'; 'Scott, Jeffrey T.'; 'Sedlak, Jonathan M.'; 'seth.goodchild@weil.com'; 'shirli.weiss'; 'Sinopole, Angelica M.'; 'Sollors, David M.'; 'Stanislaus, Darnell'; 'Susanna M. Buerger'; 'Thomas C. Rice'; 'Tomaino Jr., Michael T.'; 'vernon.broderick@weil.com'; 'Wayne, Stephanie S.'; 'Weir, William H.'; 'White, Thomas C.'; 'Yue, Yujing'; Andrew Dunlap

Cc: 'mkasowitz@kasowitz.com'; 'kleung@kasowitz.com'; 'CBecker@kasowitz.com'; 'cjohnson@kasowitz.com'; Manisha Sheth; Nicholas Joseph

Subject: RE: Briefing on Sampling

All – We're negotiating now with the UBS defendants on the schedule for the sampling briefing in that case and are emailing to fulfill the Judge's request that we work out the rest of the dates in the other cases as well.

For your consideration, our proposal would be: FHFA sampling expert reports in Tranche II disclosed September 11, in other tranches, September 25. Rebuttal reports including objections and any Daubert challenges, all tranches except UBS, by October 30. Replies on November 19.

Let us know your comments,

Best,

c.

From: Shane, Penny [<mailto:ShaneP@sullcrom.com>]

Sent: Monday, July 23, 2012 12:00 PM

To: Richard Schirtzer; robert.fumerton; alexander.drylewski; Sedlak, Jonathan M.

Cc: 'mkasowitz@kasowitz.com'; 'kleung@kasowitz.com'; 'CBecker@kasowitz.com'; 'cjohnson@kasowitz.com'; O'Brien, William J; Jon Corey; Shaina Johnson; Hanin, Michael; *JPFHFAAssociates; ABosse; afrankel@stblaw.com; alexander.drylewski; allie.cheatham; amichaelson@bsflp.com; amirchaff; anthony.gill; AShapiro; aturner; avan; awatzman; Awu; azolot; Bathae, Yavar; bostrager; Christine Chung; Brad S. Karp; Bradley, Megan; Braff, David H.; Brian E. Pastuszewski; Brian.weinstein; bridget.oconnor; Bruce Birenboim; Bryan.Levine@skadden.com; BStewart@wc.com; Caitlin Grusauskas; camaratac; Cassidy, Elizabeth A.; Castleman, David A.; cbernard; christina.trapani@weil.com; Clark, Bruce E.; Coyle, Victoria A.; cprovenzano; Daniel.schwartz; David A. Beck; david.byeff@weil.com; david.priebe; Davidoff, Amanda Flug; Day, Brendan; Dblatt; Dehoney, David R.; Diffie, Christopher M.; djames; Don M Kennedy; DPotter; dstein; dtyukody; dwoll; dzinman@rkollp.com; EBennett; Edelman, Theodore; edlinr; erosen; Farbiarz, Adam J.; Frawley, Brian T.; Fritsch, Joshua J.; fugate; greg.danilow; Harris, Adrienne A.; High, Tracy Richelle; hong; Hu, Ellen C.; irethy; jane.morril; jarteaga; jay.kasner; JBurns@KRAMERLEVIN.com; Jeff Lipps; Jen Battle; jgibbons; jhaims; jlongwell; John B Daukas; John J Falvey; John McNichols; john.mastando; Jon Connolly; jrobinson; jsneider@bsflp.com; julia.kiechel; Katzman, David P.; kfernandez; khamm; kim.kalmanson; Klapper, Richard H.; Kleysteuber, Rudy; Krugman, Maya; leftonr; Leif Dautch; Li, Olivia S.; LMorton; Imoskowitz@cravath.com; Marley.Brumme; mbloom@cravath.com; McCarthy, John G.; McCullough, Austin F.; McLendon, Aliya M.; Michael T. Reynolds; michael.firestone@weil.com; mmcgarry@stblaw.com; msilver; mware; nadia.moore; nbinder@rkollp.com; Nelles, Sharon L.; nicholas.george; nicolas.morgan; ntekeei@rkollp.com; Oster, John F.; pamela.chepiga; patrick.fitzmaurice; pbryan; petercho; Pierre, Jennifer; Popovsky, Mark A.; Razza, Jordan T.; Reilly, Katherine C.; Rein, David M.J.; rgoeke; Richard W. Clary; RLeraris; RMBS-LIT@mayerbrown.com; Robert J. Kopecky; robert.fumerton; rouhandeh; roy.gilchrist@weil.com; rserio; rspehr; Sacca, Joseph N.; sandra.hauser; SBonderoff; scady; Scott D. Musoff; Scott, Jeffrey T.; Sedlak, Jonathan M.; seth.goodchild@weil.com; shirli.weiss; Sinopole, Angelica M.; Sollors, David M.; Stanislaus, Darnell; Susanna M. Buerger; Thomas C. Rice; Tomaino Jr., Michael T.; vernon.broderick@weil.com; Wayne, Stephanie S.; Weir, William H.; White, Thomas C.; Yue, Yujing; Christine Chung; Andrew Dunlap; Jordan Goldstein

Subject: RE: FHFA v. UBS, 11 Civ. 5201 (DLC)

Richard –

Hope you had a good weekend.

July 31st does not work for all defendants, but August 1 does. Please let us know if you can make August 1 work for your side.

Thanks.

Penny

From: Richard Schirtzer [<mailto:richardschirtzer@quinnemanuel.com>]

Sent: Friday, July 20, 2012 12:13 PM

To: Shane, Penny; robert.fumerton; alexander.drylewski; Sedlak, Jonathan M.

Cc: 'mkasowitz@kasowitz.com'; 'kleung@kasowitz.com'; 'CBecker@kasowitz.com'; 'cjohnson@kasowitz.com'; O'Brien, William J; Jon Corey; Shaina Johnson; Hanin, Michael; *JPFHFAAssociates; ABosse; afrankel@stblaw.com; alexander.drylewski; allie.cheatham; amichaelson@bsflp.com; amircheff; anthony.gill; AShapiro; aturner; avan; awatzman; Awu; azolot; Bathaee, Yavar; bostrager; Christine Chung; Brad S. Karp; Bradley, Megan; Braff, David H.; Brian E. Pastuszewski; Brian.weinstein; bridget.oconnor; Bruce Birenboim; Bryan.Levine@skadden.com; BStewart@wc.com; Caitlin Grusauskas; camaratac; Cassidy, Elizabeth A.; Castleman, David A.; cbernard; christina.trapani@weil.com; Clark, Bruce E.; Coyle, Victoria A.; cprovenzano; Daniel.schwartz; David A. Beck; david.byeff@weil.com; david.priebe; Davidoff, Amanda Flug; Day, Brendan; Dblatt; Dehoney, David R.; Diffie, Christopher M.; djames; Don M Kennedy; DPotter; dstein; dtyukody; dwoil; dzinman@rkollp.com; EBennett; Edelman, Theodore; edlinr; erosen; Farbiarz, Adam J.; Frawley, Brian T.; Fritsch, Joshua J.; fugate; greg.danilow; Harris, Adrienne A.; High, Tracy Richelle; hong; Hu, Ellen C.; irethy; jane.morril; jarteaga; jay.kasner; JBurns@KRAMERLEVIN.com; Jeff Lipps; Jen Battle; jgibbons; jhaims; jlongwell; John B Daukas; John J Falvey; John McNichols; john.mastando; Jon Connolly; jrobinson; jsneider@bsflp.com; julia.kiechel; Katzman, David P.; kfernandez; khamm; kim.kalmanson; Klapper, Richard H.; Kleysteuber, Rudy; Krugman, Maya; leftonr; Leif Dautch; Li, Olivia S.; LMorton; Imoskowitz@cravath.com; Marley.Brumme; mbloom@cravath.com; McCarthy, John G.; McCullough, Austin F.; McLendon, Aliya M.; Michael T. Reynolds; michael.firestone@weil.com; mmcgarry@stblaw.com; msilver; mware; nadia.moore; nbinder@rkollp.com; Nelles, Sharon L.; nicholas.george; nicolas.morgan; ntekeei@rkollp.com; Oster, John F.; pamelachepiga; patrick.fitzmaurice; pbryan; petercho; Pierre, Jennifer; Popovsky, Mark A.; Razza, Jordan T.; Reilly, Katherine C.; Rein, David M.J.; roeke; Richard W. Clary; RLeraris; RMBS-LIT@mayerbrown.com; Robert J. Kopecky; robert.fumerton; rouhandeh; roy.gilchrist@weil.com; rserio; rspehr; Sacca, Joseph N.; sandra.hauser; SBonderoff; scady; Scott D. Musoff; Scott, Jeffrey T.; Sedlak, Jonathan M.; seth.goodchild@weil.com; shirli.weiss; Sinopole, Angelica M.; Sollors, David M.; Stanislaus, Darnell; Susanna M. Buerger; Thomas C. Rice; Tomaino Jr., Michael T.; vernon.broderick@weil.com; Wayne, Stephanie S.; Weir, William H.; White, Thomas C.; Yue, Yujing; Christine Chung; Andrew Dunlap; Jordan Goldstein

Subject: RE: FHFA v. UBS, 11 Civ. 5201 (DLC)

Following up on yesterday's call with Judge Cote, if a hearing should prove necessary on 30b6 issues the only proposed day that works for FHFA is July 31st. Does that work for Defendants?

From: Shane, Penny [<mailto:ShaneP@sullcrom.com>]

Sent: Thursday, July 19, 2012 12:11 PM

To: Richard Schirtzer; robert.fumerton; alexander.drylewski; Sedlak, Jonathan M.

Cc: 'mkasowitz@kasowitz.com'; 'kleung@kasowitz.com'; 'CBecker@kasowitz.com'; 'cjohnson@kasowitz.com'; O'Brien, William J; Jon Corey; Shaina Johnson; Hanin, Michael; *JPFHFAAssociates; ABosse; afrankel@stblaw.com; alexander.drylewski; allie.cheatham; amichaelson@bsflp.com; amircheff; anthony.gill; AShapiro; aturner; avan; awatzman; Awu; azolot; Bathaee, Yavar; bostrager; Brad S. Karp; Bradley, Megan; Braff, David H.; Brian E. Pastuszewski; Brian.weinstein; bridget.oconnor; Bruce Birenboim; Bryan.Levine@skadden.com; BStewart@wc.com; Caitlin Grusauskas; camaratac; Cassidy, Elizabeth A.; Castleman, David A.; cbernard; christina.trapani@weil.com; Clark, Bruce E.; Coyle, Victoria A.; cprovenzano; Daniel.schwartz; David A. Beck; david.byeff@weil.com; david.priebe; Davidoff, Amanda Flug; Day, Brendan; Dblatt; Dehoney, David R.; Diffie, Christopher M.; djames; Don M Kennedy; DPotter; dstein; dtyukody; dwoil; dzinman@rkollp.com; EBennett; Edelman, Theodore; edlinr; erosen; Farbiarz, Adam J.; Frawley, Brian T.; Fritsch, Joshua J.; fugate; greg.danilow; Harris, Adrienne A.; High, Tracy Richelle; hong; Hu, Ellen C.; irethy; jane.morril; jarteaga; jay.kasner; JBurns@KRAMERLEVIN.com; Jeff Lipps; Jen Battle; jgibbons; jhaims; jlongwell; John B Daukas; John J Falvey; John McNichols; john.mastando; Jon Connolly; jrobinson; jsneider@bsflp.com; julia.kiechel; Katzman, David P.; kfernandez; khamm; kim.kalmanson; Klapper, Richard H.; Kleysteuber, Rudy; Krugman, Maya; leftonr; Leif

Dautch; Li, Olivia S.; LMorton; moskowitz@cravath.com; Marley.Brumme; mbloom@cravath.com; McCarthy, John G.; McCullough, Austin F.; McLendon, Aliya M.; Michael T. Reynolds; michael.firestone@weil.com; mmcgarry@stblaw.com; msilver; mware; nadia.moore; nbinder@rkollp.com; Nelles, Sharon L.; nicholas.george; nicolas.morgan; ntekeei@rkollp.com; Oster, John F.; pamela.chepiga; patrick.fitzmaurice; pbryan; petercho; Pierre, Jennifer; Popovsky, Mark A.; Razza, Jordan T.; Reilly, Katherine C.; Rein, David M.J.; rgoeke; Richard W. Clary; Rleraris; RMBS-LIT@mayerbrown.com; Robert J. Kopecky; robert.fumerton; rouhandeh; roy.gilchrist@weil.com; rserio; rspehr; Sacca, Joseph N.; sandra.hauser; SBonderoff; scady; Scott D. Musoff; Scott, Jeffrey T.; Sedlak, Jonathan M.; seth.goodchild@weil.com; shirli.weiss; Sinopole, Angelica M.; Sollors, David M.; Stanislaus, Darnell; Susanna M. Buerger; Thomas C. Rice; Tomaino Jr., Michael T.; vernon.broderick@weil.com; Wayne, Stephanie S.; Weir, William H.; White, Thomas C.; Yue, Yujing

Subject: RE: FHFA v. UBS, 11 Civ. 5201 (DLC)

Thanks for letting us know, Richard.

Do you anticipate that these documents will reflect germane "information barriers" within both Fannie and Freddie during the period in question?

Will the 30(b)(6) witnesses you plan to produce tomorrow and next week answer questions about these documents?

If not, do you plan to produce another 30(b)(6) witness for questioning about these documents?

From: Richard Schirtzer [<mailto:richardschirtzer@quinnemanuel.com>]

Sent: Thursday, July 19, 2012 2:57 PM

To: Shane, Penny; robert.fumerton; alexander.drylewski; Sedlak, Jonathan M.

Cc: 'mkasowitz@kasowitz.com'; 'kleung@kasowitz.com'; 'CBecker@kasowitz.com'; 'cjohnson@kasowitz.com'; O'Brien, William J; Jon Corey; Shaina Johnson; Hanin, Michael; *JPFHFAAssociates; ABosse; afrankel@stblaw.com; alexander.drylewski; allie.cheatham; amichaelson@bsflp.com; amirchaff; anthony.gill; AShapiro; aturner; avan; awatzman; Awu; azolot; Bathae, Yavar; bostrager; Brad S. Karp; Bradley, Megan; Braff, David H.; Brian E. Pastuszewski; Brian.weinstein; bidget.oconnor; Bruce Birenboim; Bryan.Levine@skadden.com; BStewart@wc.com; Caitlin Grusauskas; camaratac; Cassady, Elizabeth A.; Castleman, David A.; cbernard; christina.trapani@weil.com; Clark, Bruce E.; Coyle, Victoria A.; cprovenzano; Daniel.schwartz; David A. Beck; david.byeff@weil.com; david.priebe; Davidoff, Amanda Flug; Day, Brendan; Dblatt; Dehoney, David R.; Diffie, Christopher M.; djames; Don M Kennedy; DPotter; dstein; dtyukody; dwoil; dzinman@rkollp.com; EBennett; Edelman, Theodore; edlin; erosen; Farbiarz, Adam J.; Frawley, Brian T.; Fritsch, Joshua J.; fugate; greg.danilow; Harris, Adrienne A.; High, Tracy Richelle; hong; Hu, Ellen C.; irethy; jane.morril; jarteaga; jay.kasner; JBurns@KRAMERLEVIN.com; Jeff Lipps; Jen Battle; jgibbons; jhaims; jlongwell; John B Daukas; John J Falvey; John McNichols; john.mastando; Jon Connolly; jrobinson; jsneider@bsflp.com; julia.kiechel; Katzman, David P.; kfernandez; khamm; kim.kalmanson; Klapper, Richard H.; Kleysteuber, Rudy; Krugman, Maya; leftonr; Leif Dautch; Li, Olivia S.; LMorton; moskowitz@cravath.com; Marley.Brumme; mbloom@cravath.com; McCarthy, John G.; McCullough, Austin F.; McLendon, Aliya M.; Michael T. Reynolds; michael.firestone@weil.com; mmcgarry@stblaw.com; msilver; mware; nadia.moore; nbinder@rkollp.com; Nelles, Sharon L.; nicholas.george; nicolas.morgan; ntekeei@rkollp.com; Oster, John F.; pamela.chepiga; patrick.fitzmaurice; pbryan; petercho; Pierre, Jennifer; Popovsky, Mark A.; Razza, Jordan T.; Reilly, Katherine C.; Rein, David M.J.; rgoeke; Richard W. Clary; Rleraris; RMBS-LIT@mayerbrown.com; Robert J. Kopecky; robert.fumerton; rouhandeh; roy.gilchrist@weil.com; rserio; rspehr; Sacca, Joseph N.; sandra.hauser; SBonderoff; scady; Scott D. Musoff; Scott, Jeffrey T.; Sedlak, Jonathan M.; seth.goodchild@weil.com; shirli.weiss; Sinopole, Angelica M.; Sollors, David M.; Stanislaus, Darnell; Susanna M. Buerger; Thomas C. Rice; Tomaino Jr., Michael T.; vernon.broderick@weil.com; Wayne, Stephanie S.; Weir, William H.; White, Thomas C.; Yue, Yujing

Subject: RE: FHFA v. UBS, 11 Civ. 5201 (DLC)

Following up on one issue raised in yesterday's meet and confer, in addition to the written responses I have previously promised to provide on Monday relating to the 30(b)(6) topics, Plaintiff will produce copies of GSE policies that are germane to some of our previous discovery objections, including but not limited to information barrier policies. We expect to

have most of these policies by Monday, but if additional policies are located thereafter we will forward those as well.

From: Shane, Penny [<mailto:ShaneP@sullcrom.com>]

Sent: Friday, July 13, 2012 12:52 PM

To: Richard Schirtzer; robert.fumerton; alexander.drylewski; Sedlak, Jonathan M.

Cc: 'mkasowitz@kasowitz.com'; 'kleung@kasowitz.com'; 'CBecker@kasowitz.com'; 'cjohnson@kasowitz.com'; O'Brien, William J; Jon Corey; Shaina Johnson; Hanin, Michael; *JPFHFAAssociates; ABosse; afrankel@stblaw.com; alexander.drylewski; allie.cheatham; amichaelson@bsflp.com; amirchreff; anthony.gill; AShapiro; aturner; avan; awatzman; Awu; azolot; Bathae, Yavar; bostrager; Brad S. Karp; Bradley, Megan; Braff, David H.; Brian E. Pastuszewski; Brian.weinstein; bridget.oconnor; Bruce Birenboim; Bryan.Levine@skadden.com; BStewart@wc.com; Caitlin Grusauskas; camaratac; Cassady, Elizabeth A.; Castleman, David A.; cbernard; christina.trapani@weil.com; Clark, Bruce E.; Coyle, Victoria A.; cprovenzano; Daniel.schwartz; David A. Beck; david.byeffer@weil.com; david.priebe; Davidoff, Amanda Flug; Day, Brendan; Dblatt; Dehoney, David R.; Diffie, Christopher M.; djames; Don M Kennedy; DPotter; dstein; dtyukody; dwoll; dzinman@rkollp.com; EBennett; Edelman, Theodore; edlinr; erosen; Farbiarz, Adam J.; Frawley, Brian T.; Fritsch, Joshua J.; fugate; greg.danilow; Harris, Adrienne A.; High, Tracy Richelle; hong; Hu, Ellen C.; irethy; jane.morril; jarteaga; jay.kasner; JBurns@KRAMERLEVIN.com; Jeff Lipps; Jen Battle; jgibbons; jhaims; jlongwell; John B Daukas; John J Falvey; John McNichols; john.mastando; Jon Connolly; jrobinson; jsneider@bsflp.com; julia.kiechel; Katzman, David P.; kfernandez; khamm; kim.kalmanson; Klapper, Richard H.; Kleysteuber, Rudy; Krugman, Maya; leftonr; Leif Dautch; Li, Olivia S.; LMorton; Imoskowitz@cravath.com; Marley.Brumme; mbloom@cravath.com; McCarthy, John G.; McCullough, Austin F.; McLendon, Aliya M.; Michael T. Reynolds; michael.firestone@weil.com; mmcgarry@stblaw.com; msilver; mware; nadia.moore; nbinder@rkollp.com; Nelles, Sharon L.; nicholas.george; nicolas.morgan; ntekeei@rkollp.com; Oster, John F.; pamela.chepiga; patrick.fitzmaurice; pbryan; petercho; Pierre, Jennifer; Popovsky, Mark A.; Razza, Jordan T.; Reilly, Katherine C.; Rein, David M.J.; rgoeke; Richard W. Clary; RLeraris; RMBS-LIT@mayerbrown.com; Robert J. Kopecky; robert.fumerton; rouhandeh; roy.gilchrist@weil.com; rserio; rspehr; Sacca, Joseph N.; sandra.hauser; SBonderoff; scady; Scott D. Musoff; Scott, Jeffrey T.; Sedlak, Jonathan M.; seth.goodchild@weil.com; Shane, Penny; shirli.weiss; Sinopole, Angelica M.; Sollors, David M.; Stanislaus, Darnell; Susanna M. Buerger; Thomas C. Rice; Tomaino Jr., Michael T.; vernon.broderick@weil.com; Wayne, Stephanie S.; Weir, William H.; White, Thomas C.; Yue, Yujing

Subject: RE: FHFA v. UBS, 11 Civ. 5201 (DLC)

Richard,

As you requested, all defendants are copied on this email, to enable you to send us all the description you just gave us by phone of a proposed approach to certain 30(b) deposition topics.

We look forward to reading it and to further discussions.

Regards,

Penny

From: Richard Schirtzer [<mailto:richardschirtzer@quinnemanuel.com>]

Sent: Thursday, July 12, 2012 5:54 PM

To: Shane, Penny; robert.fumerton; alexander.drylewski; Sedlak, Jonathan M.

Cc: 'mkasowitz@kasowitz.com'; 'kleung@kasowitz.com'; 'CBecker@kasowitz.com'; 'cjohnson@kasowitz.com'; O'Brien, William J; Jon Corey; Shaina Johnson; Hanin, Michael

Subject: RE: FHFA v. UBS, 11 Civ. 5201 (DLC)

I do not yet have the answers on the follow-up items from yesterday's call, but am aiming to have them by the time we talk tomorrow about the 2nd RFPs. I am also working on expediting the timeframe in which we could provide written responses on some of the custodial topics, and hope to have an answer on that as well by tomorrow. Please share this with other defense counsel if you will.

This e-mail is sent by a law firm and contains information that may be privileged and confidential. If you are not the intended recipient, please delete the e-mail and notify us immediately.

Exhibit 2

SULLIVAN & CROMWELL LLP

TELEPHONE: 1-202-956-7500

FACSIMILE: 1-202-293-6330

WWW.SULLCROM.COM

*1701 Pennsylvania Avenue, N.W.
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MELBOURNE • SYDNEY

October 13, 2012

Via E-mail

Philippe Selendy
Quinn Emanuel Urquhart & Sullivan, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010

Re: FHFA Actions (other than UBS)

Dear Philippe:

I write on behalf of Defendants (other than UBS) in response to your letter of October 10, 2012 concerning a briefing schedule for objections by these Defendants to the October 10 Expert Report of Charles D. Cowan (the "Second Cowan Report").

As Jon Sedlak explained in his email of August 24, Judge Cote indicated that UBS would be the "stalking-horse on the issue for everyone" with respect to sampling. UBS's reply brief concerning sampling was filed two days ago. It is premature to set a schedule for addressing other Defendants' motions when the parties do not yet know how Judge Cote will address the UBS briefing. Setting a schedule also is premature because to evaluate FHFA's proposal, Defendants may require, at a minimum, information such as how Dr. Cowan has applied his general methodology (so far) to obtain the loan numbers for each sample. Such information includes, for example, what data Dr. Cowan had, as well as a description of the tests he ran, his calculations and results, and the seeds he used for random number generators.

Please let us know when FHFA can provide such information so that we can factor that time into a schedule.

Sincerely,

/s/ Amanda Davidoff

Amanda Davidoff

cc: All counsel of record

Exhibit 3

October 10, 2012

VIA ELECTRONIC MAIL

Jonathan Sedlak
Sullivan & Cromwell LLP
125 Broad Street
New York, New York 10004-2498

Re: FHFA Actions: Briefing Schedule Regarding Sampling Expert Reports

Dear Jon:

We write on behalf of Plaintiff Federal Housing Finance Agency ("FHFA"), as Conservator for Fannie Mae and Freddie Mac, in response to your email of August 24, 2012, concerning a briefing schedule for any objections by Defendants (other than UBS)¹ to the Expert Report of Charles D. Cowan, Ph.D. Regarding the Selection of Statistically Valid Random Samples for Fifteen FHFA Actions (the "Second Cowan Report"), which FHFA will serve today.

Because the same sampling method applies to all cases in these actions, FHFA proposes that a schedule be set for all Defendants to assert, in common or coordinated briefing, any challenges to the opinions disclosed in the Second Cowan Report, including under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

As set forth in the Second Cowan Report, the proposed sampling methodology is common across all securitizations in these cases. Consistent with the samples proposed for the UBS case, 100-loan samples are drawn from the supporting loan groups in each securitization, stratified by the variable of borrower credit score (where available), thus ensuring representativeness at a 95 percent confidence level with a margin of error of no more than plus or minus 10 percent. Each sample has been tested for representativeness using up to eleven key variables, confirming a high correspondence between the characteristics of the samples and those of the loan populations.

FHFA proposes that, if Defendants do intend to lodge any such objections, motions must be filed by October 30, 2012, with FHFA's opposition due November 13, 2012, and any reply due November 20, 2012. Please let us know before the conference tomorrow whether you will agree to this schedule.

¹ As you know, Dr. Cowan addressed the UBS Securitizations in his first report, as to which briefing has already been submitted by both Plaintiff and the UBS Defendants.

Very truly yours,

/s/ Philippe Z. Selendy
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Agency in FHFA v. UBS Americas, Inc., FHFA v.
JPMorgan Chase & Co., FHFA v. Deutsche
Bank AG, FHFA v. Citigroup Inc., and FHFA v.
Goldman, Sachs & Co.*

/s/ Christine H. Chung
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*Attorney for Plaintiff Federal Housing Finance
Agency in FHFA v. First Horizon National
Corp., FHFA v. Bank of America Corp., and
FHFA v. Credit Suisse Holdings (USA), Inc.*

/s/ Richard A. Schirtzer
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and FHFA v. Nomura Holding America, Inc.*

/s/ Manisha M. Sheth
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*Attorney for Plaintiff Federal Housing Finance
Agency in FHFA v. JPMorgan Chase & Co.,
FHFA v. Barclays Bank PLC, FHFA v. Citigroup
Inc., and FHFA v. Merrill Lynch & Co., Inc.*

/s/ Kanchana Wangkeo Leung
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1633 Broadway
New York, NY 10019

*Attorney for Plaintiff Federal Housing Finance
Agency in FHFA v. Ally Financial Inc., FHFA v.
General Electric Company, FHFA v. Morgan
Stanley, and FHFA v. SG Americas, Inc.*

cc: All Counsel of Record

Exhibit 4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X	
FEDERAL HOUSING FINANCE AGENCY :	
AS CONSERVATOR FOR THE FEDERAL :	
NATIONAL MORTGAGE ASSOCIATION :	11-cv-5201 (DLC)
AND THE FEDERAL HOME LOAN :	
MORTGAGE CORPORATION, :	ECF Case
Plaintiff, :	Electronically Filed
v. :	
UBS AMERICAS INC., UBS REAL ESTATE :	
SECURITIES INC., UBS SECURITIES, LLC, :	
MORTGAGE ASSET SECURITIZATION :	
TRANSACTIONS, INC., DAVID MARTIN, :	
PER DYRVIK, HUGH CORCORAN, and :	
PETER SLAGOWITZ, :	
Defendants. :	
----- X	

**DEFENDANTS' RESPONSE TO PLAINTIFF'S REPLY MEMORANDUM OF LAW
IN SUPPORT OF THE EXPERT REPORT OF CHARLES D. COWAN, PH.D.**

The UBS Defendants submit this response to Plaintiff's Reply Memorandum in Support of the Expert Report of Charles D. Cowan, Ph.D. on Behalf of Plaintiff Concerning The Selection of Statistically Valid Random Samples of Mortgage Loans ("Plaintiffs' Reply"), which seeks affirmative relief for the first time – *i.e.*, a ruling *in limine*, many months before the close of expert discovery and trial, that Dr. Cowan's testimony is admissible. But "sample design" by itself is not admissible evidence, and there is no basis to grant this unprecedented relief.

Incredibly, Plaintiff seems to protest the fact that the UBS Defendants did not file a motion to bar Dr. Cowan's testimony at trial. Indeed, Plaintiff's Reply may be the first instance in which a party has protested *not* receiving a *Daubert* challenge. Although Plaintiff

argues that the UBS Defendants' position regarding the Cowan Report is not clear, their response could not be more straightforward:

At this time, the UBS Defendants will not seek to bar at trial testimony based upon the opinions in the Cowan Report pursuant to Federal Rule of Evidence 702 and the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) ("*Daubert*").

(UBS Mem. at 1.) Thus, rather than file a *Daubert* motion at this stage, the UBS Defendants acknowledged that potential issues may arise relating to "*weight and probative value* of all assumptions and findings in the Cowan Report" and reserved their rights to challenge any "*supplemental* opinion by Dr. Cowan, including any opinion based on *application* of the sampling methodology described" if and when those supplemental opinions are issued (*Id.* at 5-6 (emphasis added).) In other words, the UBS Defendants will not file a *Daubert* challenge to the opinions in Dr. Cowan's current report, but reserve the right to challenge any later-expressed opinions. Apparently Plaintiff would have the UBS Defendants file today a *Daubert* motion with respect to opinions the UBS Defendants have not yet seen.

I. THE UBS DEFENDANTS HAVE COMPLIED WITH THE COURT'S INSTRUCTIONS

Contrary to Plaintiff's contention, the UBS Defendants' response to the Cowan Report complied fully with the Court's directives in this case: it acknowledged the September 7, 2012 deadline for filing a *Daubert* challenge to the August 9, 2012 Cowan Report; identified several potential objections relating to the weight and probative value of Dr. Cowan's potential testimony; and reserved the right to challenge any undisclosed, supplemental opinions Dr.

Cowan may offer.¹ In addition to complying with the Court's instructions, this approach is consistent with this Court's approach to expert issues in prior cases. As this Court has noted:

It will, of course, be critical for the jury to understand the methodology of the testing, the limits of any testing process, the difficulty of reproducing test results, and all of the factors which make a comparison of results difficult or unreliable. . . . [Defendant's] arguments, however, go to the weight which the jury should accord the various test results and do not require that a hearing be held on the admissibility of those results under Rules 104(a) and 702, Fed. R. Evid., and the Supreme Court's decision in *Daubert*.

Maran Coal Corp. v. Societe Generale De Surveillance S.A., 1996 WL 11235 (S.D.N.Y. Jan. 10, 1996) (Cote, J.).

Likewise, Plaintiff apparently misunderstands the Court's comments at the July 31, 2012 conference. As the Court recognized, with respect to "objections that the defendants might have as to the admissibility of the plaintiff's expert testimony that couldn't be fairly made with respect to the August 9th report, [defendants'] rights are preserved." (July 31, 2012 Conference Tr. at 40.) Those comments are consistent with the fact that Federal Rule of Evidence 702 and *Daubert* apply not only to the principle or method itself, but also whether "the witness has *applied the principles and methods reliably to the facts of the case*." Fed. R. Evid. 702 (emphasis added).²

Here, the Cowan Report hints at issues to which the UBS Defendants could not object at this time. Even Dr. Cowan admits that it is premature to assess application of the sampling methodologies in this case. (*See, e.g.*, Cowan Report ¶¶ 30, 63; UBS Mem. at 1-2.)

¹ The UBS Defendants objected to the procedure ordered by this Court on July 31, 2012, noted those objections in its submission (UBS Mem. at 1 n.1 (citing July 31 Conference Tr. at 19, 22-27, 38)), and continues to assert those objections. Nonetheless, despite these objections, the UBS Defendants have in fact complied with the Court's procedure.

² Plaintiff also ignores the authority the UBS Defendants cited regarding Federal Rule of Evidence 702 and an expert's *application* of scientific methods to extrapolate or reach conclusions. (UBS Mem. at 2 n.3.)

There is no debate that Dr. Cowan has yet to identify the specific method that he will use for extrapolation, much less to apply the principles and methods to the facts of this case. Plaintiff's protestations that Dr. Cowan has "identified" two potential extrapolation formulas cannot change the fact that Dr. Cowan has not applied those formulas or performed any extrapolation. In other words, until Dr. Cowan actually performs that analysis and reaches his results, there is no evidence that the UBS Defendants may seek to exclude.

Likewise, it is unclear precisely what Plaintiff demands that the Court admit months before trial. "Sample design," standing alone, does not constitute admissible evidence. Nor does Plaintiff's citation to *MBIA Insurance Corp. v. Countrywide Home Loans*, No. 606825/08, 2010 WL 5186702 (N.Y. Sup. Dec. 22, 2010), entitle Plaintiff to the sweeping relief that it unilaterally demands. (Pl. Reply at 4-5.) To the contrary, the court in that case noted that:

The court makes no finding that . . . Plaintiff's method is without flaw or unsusceptible to challenge. Defendants have raised significant valid challenges to Plaintiff's methodology; *however the court finds that such challenges are premature to decide here*. Defendants cited issues will be decided by the trier of fact as pertaining to the weight, rather than the acceptability, of the evidence.

MBIA Ins. Corp., 2010 WL 5186702, at *5. Consistent with that commentary, the UBS Defendants continue to reserve their right to challenge the application of Dr. Cowan's sampling methodology and the weight and probative value of his assumptions and findings once Dr. Cowan performs that extrapolation.

II. PLAINTIFF'S EFFORTS TO PREEMPTIVELY BOLSTER THE COWAN REPORT FAIL

The UBS Defendants' response highlighted a few examples of the flaws that may affect the weight and probative value of any properly admitted testimony based upon the Cowan Report. (UBS Mem. at 3-5.) Despite the fact that the UBS Defendants have not sought to exclude Dr. Cowan's testimony at trial based upon his preliminary report, Plaintiff spends the

bulk of its submission attempting to challenge those flaws. (Pl. Reply at 4-9.) Plaintiffs' arguments are premature and ultimately a question for the trier of fact. But Plaintiff misstates the UBS Defendants' position to such an extent that brief clarification is necessary.

For example, despite Plaintiff's protestations to the contrary, distinguishing between originators within the same loan pool is critical. Plaintiff cannot dispute that whether a loan complied with the representations and warranties is an issue that must be determined by examining the specific underwriting guidelines of the originator of that loan. Indeed, as Plaintiff ignores, its own complaint (1) distinguishes between originators within the same loan pool and (2) alleges departures from the applicable underwriting guidelines for loans based on allegations broken out by originator. (UBS Mem. at 3 (citing UBS Second Amended Compl. ¶ 142).) Similarly, the offering documents for various certificates differentiate between originators and have specific disclosures as to the different underwriting guidelines and provisions within those guidelines for making exceptions. For example, the MABS 2005-HE2 securitization's offering documents describe different levels of exceptions for different originators. With respect to MILA, Inc., the offering documents disclosed that, on a case-by-case basis, exceptions to the underwriting guidelines "*may be allowed* if the application reflects compensating factors." (Dkt. 100 (Declaration of Arnold Barnett, Ph.D.) ¶ 69.) But with respect to New Century Mortgage Corporation, the offering documents disclosed that "*it is expected that a substantial portion of the mortgage loans in the mortgage loans that were originated by New Century will represent*" exceptions to New Century's underwriting guidelines. (*Id.*; *see also id.* ¶ 70 (citing additional examples).)

Thus, because each originator operated under its own set of underwriting guidelines and exceptions policies, it is critical to evaluate any sample on an originator by

originator basis to determine – once Dr. Cowan has performed his extrapolation – whether that sub-set of the loan pool sample is sufficiently large to draw statistically valid conclusions about each originator sub-sample within the specified margin of error.

CONCLUSION

For all the reasons stated here and in their response, the UBS Defendants do not seek at this time to exclude testimony at trial based upon the Cowan Report pursuant to Federal Rule of Evidence 702 and the Supreme Court's decision in *Daubert*. The UBS Defendants continue to expressly reserve all rights to challenge the weight and probative value of all assumptions and findings in the Cowan Report and reserve their rights to make a *Daubert* challenge to any supplemental opinion by Dr. Cowan, including any opinion based on application of the sampling methodology described in the Cowan Report.

Dated: October 11, 2012
New York, New York

Respectfully submitted,

/s/ Jay B. Kasner

Jay B. Kasner (jay.kasner@skadden.com)
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